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No. 80-951 [Consolidated with No. 78-1545]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Petitioner,

v.

TRANS WORLD AIRLINES, INC.,
Respondent,

and

ANNE B. ZIPES, PATRICIA A. SANTINI, and PAMELA J. DAILING, individually and as class representatives,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR PETITIONER IN NO. 80-951

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QUESTION PRESENTED

1. In an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* by former employees solely against an employer, may a court, pursuant to a settlement of that action, over the objection of the union representing incumbent employees, and absent a finding that such former employees are entitled to relief as discriminatees under Title VII:

a) order that the provisions of the settlement supersede the collective bargaining agreement between the employer and the union by granting full retroactive seniority to those former employees?

b) grant full retroactive competitive seniority to those former employees despite the absence of a determination, such as in *Franks v. Bowman Transportation Company, Inc.*, 424 U.S. 747 (1976), that they are entitled to such relief under §§ 706(g) of that Act?

2. Where a court of appeals has determined that the district court has no subject matter jurisdiction over certain claims under Title VII does the district court nonetheless have jurisdiction:

a) to approve a settlement of those same jurisdictionally-defective claims;

b) order that plaintiffs (former employees) be awarded retroactive competitive seniority;

c) order that the provisions of the settlement supersede the collective bargaining agreement between the employer and the union representing the incumbent employees;

all of the above actions being taken over the objection of the collective bargaining representative (union) of such employees?

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONER IN NO. 80-951 [1]

OPINIONS BELOW

The opinion of the Court of Appeals in No. 80-951 is reported at 630 F. 2d 1164. It is reproduced at pp. 1a to 10a of the Petition for Writ of Certiorari in that case (hereafter referred to as "IFFA Pet."). The three relevant orders of the district court have not been published

[1] The joint appendix of the parties in these consolidated cases (Nos. 78-1545 and 80-951) has been printed in two volumes, which will be referred to respectively as J.A. Vol. I, p. —— and J.A. Vol. II, p. ——. Vol. II consists of matters occurring after the August 1978 decision of the Seventh Circuit (*Consolidated*), which is described at p. 15, *infra*. As will appear, IFFA first became a participant in these proceedings as a result of developments in this litigation subsequent to that Seventh Circuit decision. See p. 11, *infra*.

but appear in IFFA Pet. at pp. 13a-19a. The consolidated case, No. 78-1545, seeks review of an earlier opinion by the Court of Appeals in this case which has been reported as *In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F.2d 1142 (7th Cir. 1978), and this opinion appears in IFFA Pet. at pp. 40a-58a. Two other opinions have issued from the Court of Appeals during the history of this litigation, and they appear at 490 F.2d 636 and 455 F.2d 101. Previous opinions of the district court have been unofficially reported at 9 FEP 101; 12 FEP 1461; and 17 FEP 1512.

JURISDICTION

The judgment of the Court of Appeals in No. 80-951, was entered on June 13, 1980. A timely petition for rehearing was filed on June 25, 1980. The petition for certiorari was filed on December 12, 1980, and certiorari was granted on March 9, 1981.[2] The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES, CONSTITUTIONAL PROVISIONS, AND RULES INVOLVED

Case No. 80-951 involves Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, particularly § 703(h), 42 U.S.C. § 2000e-2(h); § 706(d), 42 U.S.C. § 2000e-5(d) (1964); and § 706(g), 42 U.S.C. § 2000e-5(g) and the Railway Labor Act as amended, 45 U.S.C. § 151-88, particularly § 2, Seventh, 45 U.S.C. § 152, Seventh. It also involves Article III and the Due Process Clause of the Fifth Amendment to the Constitution of the United States, and Rules 23(e) and 82 of the Federal Rules of Civil Procedure. The pertinent text of these provisions appears in Appendix A to this Brief, pp. 1a-2a, *infra*.

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[2] An order limiting the grant in No. 80-951 to the first two questions presented and otherwise dismissing the writ as improvidently granted was entered on May 1, 1981 (J.A. Vol. II, pp. 212-213).

STATEMENT OF THE CASE

Introduction

Independent Federation of Flight Attendants (hereafter "IFFA"), the petitioner in No. 80-951, is the statutory bargaining representative under the Railway Labor Act of the flight attendants of respondent Trans World Airlines, Inc. (hereafter "TWA"). The judgment under review in No. 80-951 is an order of the District Court, affirmed by the Court of Appeals, which approves a "settlement agreement" entered into between TWA and the other respondents who, individually and as class representatives, brought suit against TWA under Title VII of the Civil Rights Act of 1964. These individuals and their class will sometimes be referred to herein as "Plaintiffs"; TWA will sometimes be referred to as "Defendant". The litigation between the Plaintiffs and the Defendant will be described in Part 2 of this Statement; it suffices for present purposes to note that the Court of Appeals for the Seventh Circuit decided the suit in favor of some members of the Plaintiffs' asserted class but adversely to approximately 92% of them. See *In re Consolidated Pre-Trial Proceedings In The Airline Cases*, IFFA Pet. 40a-58, reported at 582 F. 2d 1142 (1978), and referred to hereafter as "*Consolidated*". Separate petitions for certiorari were filed to review that judgment: No. 78-1545 (petition of Plaintiffs Zipes, *et al.*) and No. 78-1549 (petition of TWA).

1. *The Settlement Agreement Between Plaintiffs And TWA And Its Impact On IFFA And The Incumbent Flight Attendants.*

After filing the above-described petitions for certiorari Plaintiffs and TWA moved to defer their consideration in order that they might negotiate a settlement of their litigation. This Court granted that request on June 4, 1979. The class representatives and TWA subsequently did reach a settlement agreement. (IFFA Pet. at 23a) which we now describe.

The Agreement divides the Plaintiffs into two "subclasses": Sub-Class A, consisting of those individuals whose claims are valid according to the *Consolidated* opinion; and Sub-Class B, consisting exclusively of those individuals whose claims were determined to be jurisdictionally defective. (IFFA Pet. at 24a). In the settlement agreement TWA denies liability (IFFA Pet. at 25a), but agrees to pay the sum of three million dollars to the Plaintiff class; half to be divided among the members of Sub-Class B. (IFFA Pet. at 26a). The Notice to Class Members accompanying the settlement agreement estimates that there are 30 women in Sub-Class A and 400 in Sub-Class B (this estimate proved to be low because additional putative class members came forward later). The Notice also states that Plaintiffs' counsel would seek as much as $1,250,000 in attorney fees (plus costs). Half of the legal fees and costs are to be assessed to each Sub-Class. (J.A. Vol. II, p. 9).[3]

The settlement agreement further provides that TWA will offer re-employment to all class members who are "ready, willing and qualified" (IFFA Pet. 26a). Each re-employed class member is to receive full company and union seniority (IFFA Pet. 27a, 29a). Such seniority can be more accurately characterized in two categories: "benefit" seniority and "competitive status" seniority. See p. 19-20, *infra*, quoting *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 766. The provisions relating to benefit seniority have not been challenged by IFFA—nor have TWA's monetary obligations—and are not at issue. Under the TWA-IFFA agreement that benefit seniority is of considerable value to the Plaintiffs: For example, under Article 3 of the Agreement monthly rates of pay increase substantially in each category of employment for every six or twelve months of service,

[3] The agreement expressly provides that TWA will have no monetary or other obligation to any member of the class or representative or attorney thereof unless expressly provided in the agreement (J.A. Vol. II, p. 27a).

as the case may be. See TWA-IFFA Agreement (October 11, 1978, pp. 6-16). So too under Article 21, retirement benefits depend on the length of company service (*id.* pp. 200-207).

The provisions of the settlement agreement which *are* at issue between IFFA and the other parties to No. 80-951 are those which deal with the competitive status seniority of the Plaintiffs who are to be re-employed under the agreement, and which directly and adversely affect incumbent flight attendants. On this subject the settlement agreement originally stated:

> TWA agrees with the class that the class members who will be re-employed shall be restored to full occupational (union) seniority and credit for length of service to the same extent as is provided in Section V.A above. *However, in the event of the timely objection of any interested person, it is agreed that the amount of seniority and credit for length of service for the compensation period will be determined by the Court in its discretion, pursuant to the provisions of Section 706(g), and all other applicable provisions of law, without contest or objection by TWA.* The Court's award of seniority and credit for length of service will be added to each class member's seniority and credit for length of service to which she was entitled at the time her employment was terminated. [IFFA Pet. at 29a-30a, emphasis added.]

After the court hearing on the approval of the settlement, an "amendment" was introduced altering this section to read:

> It is agreed that the total amount of seniority and credit for length of service (both accrued and retroactive) for the compensation period *will be determined by the Court in its discretion, pursuant to the provisions of Section 706(g), and all other applicable provisions of law, without contest or objection by TWA.* [IFFA Pet. at 20a, emphasis added].

The record shows that competitive status seniority governs a broad range of employment conditions, including, but by no means limited to, the opportunity to retain, and be recalled to employment. The provisions of the collective bargaining agreement which depend upon the competitive status seniority are summarized in an exhibit at J.A. Vol. II, pp. 102-103 and are reproduced in part, *id.* at 90-101. They are discussed at length in the testimony of Victoria Frankovich, J.A. Vol. II, pp. 35-57.[4]

Among the benefits, protections and options dependent solely upon competitive seniority—and diminished by the grant of competitive seniority to Plaintiffs—are:

a) furlough (layoff) and recall (CBA Art. 10(B), J.A. Vol. II, pp. 92, 12(B), *id.* pp. 93-96, 12(F), *id.*, p. 97; Frankovich testimony, *id.*, pp. 38-39);

b) displacement (bumping) to avoid furlough (CBA Art. 12(B), J.A. Vol. II, pp. 93-96; Frankovich testimony, *id.*, pp. 40-42);

c) rest days and times, work days and times, overtime hours and earnings, and number of nights away from home (all determined by bidding for monthly schedules) (CBA Art. 18-A(D)(5), J.A. Vol. II, p. 100, and 18-B(D)(5); Frankovich testimony, *id.*, pp. 46-51);

d) transfer to different domiciles and work classifications (including promotions), (CBA Art. 13(A), J.A. Vol. II, p. 98, and LETTER NO. II, *id.*, p. 101; Frankovich testimony, *id.*, pp. 43-44).

e) vacation bidding (CBA Art. 9(C), J.A. Vol. II, pp. 90-91; Frankovich testimony, *id.*, p. 38).

TWA's flight attendants work out of domiciles or base stations located in New York, Boston, Chicago, St. Louis, Kansas City, San Francisco and Los Angeles. (Ex. 6,

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[4] Evidence on this subject came into the record at the October 3 hearing on the validity of the settlement agreement. All exhibits referred to herein were introduced by IFFA. Ex. 16, J.A. Vol. II, pp. 102-103, is a complete list of competitive seniority benefits.

J.A. Vol. II, p. 87). They are assigned to either international or domestic operations. On international operations the work classifications, in ascending pay order, are international cabin attendant, international purser, and international service manager; on domestic, the classifications are domestic cabin attendant and domestic service manager (CBA Art. 3).

The average seniority of incumbent flight attendants, as of the time of the settlement between TWA and Plaintiffs, was just over nine years (Crombie depo., J.A. Vol. II, p. 173), while the seniority of the returning Plaintiffs will range from nine to thirty years. (Ex. 8, J.A. Vol. II, p. 88). Of the 7,030 incumbent flight attendants, 4,447 have been hired since the beginning of 1970 (Ex. 9, J.A. Vol. II, p. 89), and each one will be lowered in the seniority roster by the total number of returning Plaintiffs.[5]

These factors, coupled with TWA's extraordinary economic situation and reduction in work force due to recession and fuel prices (Crombie depo., J.A. Vol. II, pp. 149-152), greatly increase the adverse impact on incumbents from the grant of seniority. Among the more serious consequences are:

1) *Effect on Current Furloughees.* Effective October 30, 1979, 164 flight attendants were furloughed (Ex. 27, J.A. Vol. II, p. 191); in June, 1980, an additional 141 flight attendants were furloughed. None have been recalled. The excess work force is, in reality, much larger than the 305 furloughs by virtue of a contractual provision requiring the offering of leaves of absence in order to reduce the number of furloughs (CBA Art. 12(B), J.A. Vol. II, p. 93). The number of flight attendants on

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[5] An additional number of incumbents will be lowered on the seniority roster, not by the total number of returning Plaintiffs, but only by the number of Plaintiffs with greater seniority. (Ex. 8, and Ex. 9, J.A. Vol. II, pp. 88, 89).

such leaves of absence was 950 in January of 1980 and 721 as of January, 1981.[6]

TWA's Vice President, David Crombie, speculated in September of 1979 that flight attendants furloughed in the then near future would be recalled within one year and that new hires would also be added to the payroll (Crombie depo., J.A. Vol. II, p. 158). The Seventh Circuit relied upon this speculation. (IFFA Pet. at 10a). In fact, in the two years since the settlement agreement was reached, more than 300 flight attendants have been involuntarily furloughed, none have been recalled, and obviously no new flight attendants have been hired.

When Plaintiffs are prepared to return to the work force, on any vacancies which arise, the present furloughees will pit their seniority for such vacancies against that of the class members. (Crombie depo., J.A. Vol. II, pp. 159-160). Plaintiffs will win and the furloughees will lose, since the grant of seniority gives all Plaintiffs far more seniority than the furloughees. (Ex. 9, J.A. Vol. II, p. 89). If furloughees are not recalled within three years (October, 1982 and June, 1983, respectively) they will lose their recall rights and be permanently removed from the seniority list (CBA Art. 12(F), J.A. Vol. II, p. 97).

2) *Effect of Future Furloughs: Displacement and Loss of Pay.* Once Plaintiffs have been absorbed into the work force there may, of course, be future furloughs. In this event, flight attendants who would otherwise be protected will be furloughed due to Plaintiffs' seniority. Other flight attendants junior to Plaintiffs, though not furloughed, will be displaced from higher-paid to lower-paid classifications, from domicile to domicile, and from inter-

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[6] Obviously, only some of these facts were known by the District Court in November of 1979. However, the proceedings in the District Court involved an attempt to determine future impact of the seniority grant to Plaintiffs, an exercise which, by definition, is conjectural. The actual events occurring subsequent to the District Court proceedings, referred to herein, are a more accurate measure of such impact.

national to domestic operations (CBA Art. 12(B), J.A. Vol. II, pp. 93-96). Reduction in classification can reduce earnings by thousands of dollars per year. Yearly income reduction from displacement to domestic operations would range from $1,610 to $4,939 (Ex. 17, J.A. Vol. II, p. 104). The effects of displacement to another domicile, apart from income reduction due to change in classification or operation, are severe: a flight attendant may continue to live in the former domicile and commute to the new domicile, or may relocate. Both commuting expenses and moving expenses are borne by the flight attendant (Oct. 3 Stipulation, J.A. Vol. II, p. 85; Crombie depo., depo., p. 66, J.A. Vol. II, p. 180).[7]

3) *Loss of Monthly Bidding Opportunities.* Flight attendants bid, on a monthly basis, for "run selections," i.e., a monthly schedule of trips. These run selections are awarded on the basis of seniority. (CBA Art. 18-A(D)(5) and 18-B(D)(5), J.A. Vol. II, pp. 99-100). The run selections determine the days of the week a flight attendant works, the days off, times of work, destination of trips, and monthly pay including overtime (CBA Art. 18-A(D)(2) and 18-B(D)(2), J.A. Vol. II, pp. 46-52). These run selections determine whether a flight attendant completes the monthly work requirement in as few as eight work days, or as many as twenty-one work days (J.A. Vol. II, pp. 49-50); whether a flight attendant gets paid only base pay for sixty-five hours or up to thirty-five additional hours, at overtime rates, ranging from $17.41 per hour for a new domestic cabin attendant to $37.03 for

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[7] A flight attendant displaced to another domicile may, because of low seniority, be unable to commute to and from work. If, by virtue of seniority, the flight attendant were on reserve at the new domicile, he/she would have to be available for duty within two hours of call to work. (J.A. Vol. II, pp. 53-54). For such a flight attendant, relocation, together with attendant separation from spouse, family, etc., would be the only alternative. (Ex. 20(b), J.A. Vol. II, pp. 107-108; Ex. 20(e), J.A. Vol. II, pp. 112-113; Ex. 20(i), J.A. Vol. II, pp. 124-125; or Ex. 20(a), J.A. Vol. II, pp. 128-129; and Ex. 20(s), J.A. Vol. II, pp. 130-131).

a six-year international service manager (CBA Art. 3(B); J.A. Vol. II, p. 51); and whether the flight attendant can schedule "turnaround trips" (trips with no overnight layovers, something very desirable to mothers with young children). (Crombie depo., J.A. Vol. II, pp. 163-164; Ex. 20(h), J.A. Vol. II, p. 116; Ex. 20(l), J.A. Vol. II, p. 122).

All incumbent flight attendants with seniority less than that of returning Plaintiffs will have a reduced ability to hold run selections they presently enjoy and will be set back in their wait for and expectation of desirable runs in the future.

4) *Downgrade From Schedule Holder to Reserve.* Flight attendants with insufficient seniority to successfully bid for a monthly run selection are placed on reserve. Unlike schedule holders, reserves do not know their work schedules in advance; they may be called upon to work with no notice, up to two hours' notice, or at most one day's notice. (J.A. Vol. II, pp. 52-54.)

Under the settlement all Plaintiffs would have sufficient seniority to be schedule holders (Crombie depo., J.A. Vol. II, p. 164). The grant of seniority to Plaintiffs will cause line holders in all domiciles to revert to reserve status.[8] Similarly those flight attendants who have put in their time as reserves, working toward accumulation of enough seniority to hold a schedule, will have their wait prolonged.[9] (Crombie depo., J.A. Vol. II, pp. 164-166).

5) *Transfer to Different Domiciles.* As indicated from the wide variances in seniority at the various domiciles

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[8] For examples of effects of a downgrade to reserve status, see Ex. 20(a), J.A. Vol. II, pp. 105-106; Ex. 20(c), J.A. Vol. II, pp. 109-110.

[9] The wait for schedule-holder status can be lengthy. In Los Angeles, international flight attendants with 1967 seniority are still on reserve. Los Angeles domestic reserves with seniority dating to 1972 are also still waiting for schedule-holder status. (Exs. 10 and 11).

(Exs. 10 and 11), some domiciles are more popular or desirable than others. Transfers between domiciles are based on seniority. CBA Art. 13(A); J.A. Vol. II, pp. 43-44). Plaintiffs desiring transfers will have preference over those with less seniority, thereby prolonging the incumbents' wait for access to the domicile of their choice.

As shown, the provisions of the settlement agreement between Plaintiffs and TWA regarding competitive seniority are directly contrary to the current TWA-IFFA collective bargaining agreement. (See also IFFA, Pet. at 62a-63a). It also purports to override past, present and future agreements between that employer and the statutory representative of its flight attendant employees (*Id.* at 36a).

2. ***The Proceedings on the Validity of the Settlement Agreement and the Judgments Under Review in No. 80-951.***

Upon learning of the new settlement agreement and the likelihood that the settlement, if approved, would cause the return of hundreds of women to the bargaining unit with great amounts of retroactive competitive seniority, IFFA intervened and objected to any grant of retroactive competitive seniority to the class members.

At the hearing on the approval of the settlement held on July 31, 1979, and in subsequent briefs, IFFA argued, *inter alia*, that (1) the District Court had no subject matter jurisdiction to approve the settlement and grant retroactive competitive seniority since the Seventh Circuit had already determined that there was no subject matter jurisdiction over the claims of the members of Sub-Class B; (2) the settlement agreement could not override the collective bargaining agreement between IFFA and TWA; and (3) the court could not grant retroactive seniority to all Plaintiffs pursuant to this settlement.

The District Court overruled the jurisdictional challenge in an order issued on September 14, 1979. (IFFA

Pet. at 13a). Judge Roszkowski reasoned that the Seventh Circuit's finding of a lack of subject matter jurisdiction was not final and therefore not binding. The court declined to address the other objections raised by the Union and set a hearing for October 3, 1979, regarding the impact a grant of seniority would have upon the incumbent flight attendants.

On November 8, 1979, the District Court signed two orders which had been drafted by counsel for the parties to the settlement. One order approved the settlement agreement and stated that the court would retain jurisdiction to determine seniority, adjudicate disputes, and enforce the settlement (IFFA Pet. at 16a). The other order awarded full retroactive competitive seniority to all Plaintiffs (IFFA Pet. at 18a). This order stated that the grant of seniority would not have an "unusual adverse impact" upon currently employed flight attendants.

IFFA appealed and the Seventh Circuit affirmed in an opinion issued on June 13, 1980 (IFFA Pet. at 1a). The Seventh Circuit held that despite its previous (and unchanged) ruling regarding the lack of subject matter jurisdiction, the District Court nonetheless had jurisdiction to approve a class action settlement and to grant seniority pursuant to that settlement, despite the objections of IFFA and the incumbent employees. The court reasoned (1) that the principles favoring settlement required this result; (2) that parties should not be "forced to litigate" a contested issue of subject matter jurisdiction; and (3) that the parties' agreement that the court had jurisdiction at least for purposes of approving the settlement and granting seniority was not "tantamount to an attempt to confer subject matter jurisdiction by consent." (IFFA Pet. at 8a).

Regarding IFFA's arguments that the settlement could not override the collective bargaining agreement, and the propriety of a grant of retroactive competitive seniority pursuant to a settlement such as this, the Seventh Circuit

said that the District Court had not abused its "discretion". The court quoted the standard for a grant of retroactive competitive seniority set forth in *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976). Finally, the court noted that it "would normally be possible" to absorb all the class members "as a result of normal attrition" in less than half a year. (IFFA Pet. at 10a).

3. *The Title VII Claims Underlying This Litigation And the Proceedings Prior to the Proposed Settlement of That Litigation.*

This litigation grows out of a "no-motherhood" policy maintained by TWA whereby flight attendants who became mothers were terminated. This policy was in effect for a number of years prior to July 2, 1965, the effective date of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*

On May 31, 1970, a charge was filed with the Equal Employment Opportunity Commission (EEOC) challenging this practice. This was the first such charge filed. A class-action complaint was filed on August 18, 1970, in the United States District Court for the Northern District of Illinois, alleging that TWA's no-motherhood policy violated Title VII. The purported class consisted of all flight attendants terminated on account of motherhood since July 2, 1965. One of the plaintiffs and class representatives was the union then representing TWA's flight attendants, the Air Line Stewards and Stewardesses Association (ALSSA). (J.A. Vol. I, pp. 4a-8a). In October of 1970, TWA entered into a collective bargaining agreement with ALSSA in which it agreed to abandon its "no-motherhood" policy. (*Id.* pp. 13a-16a, 66a).

In 1971, the class representatives and TWA agreed upon a proposed settlement under which each class member would be rehired with the amount of competitive or union seniority accrued as of the date of termination. (J.A. Vol. I, pp. 17a-26a). However, the class members

would not receive any backpay (or any other money) under the settlement. At this point the EEOC sought to intervene for purposes of blocking the proposed settlement. The District Court refused to allow intervention, and the Seventh Circuit affirmed. (J.A. Vol. I, p. 27a, 1972).[10]

In seeking court approval of the settlement, counsel for the class, who was also counsel for ALSSA, testified that a major reason for entering into the settlement was that most of the class faced a serious legal obstacle to any recovery because they were terminated long before any charge had been filed with the EEOC and, therefore, had not complied with the mandatory 90-day Title VII time limit. (J.A. Vol. I, pp. 46a-49a, 69a). The District Court subsequently approved the settlement in March of 1972. (*Id.* p. 54a).

Some class members opposed the settlement, since it did not provide for any backpay and did not grant full retroactive competitive seniority. They appealed and the Seventh Circuit reversed, in part because of a conflict it perceived between ALSSA's obligations to the class and to the (then) currently employed flight attendants. The court also directed that ALSSA be replaced as a class representative. [J.A. Vol. I, pp. 64a, 77a (1973)] Some of the successful dissidents became new class representatives.

Following the remand, TWA moved to amend its answer to include an affirmative defense that some class members were barred by the failure to file a timely charge. (J.A. Vol. I, p. 89a). The motion was sustained. (*Id.* p. 98a) (1974). In its original answer, TWA had alleged that it was without knowledge as to when a charge was filed. (*Id.* pp. 11a-12a).

In 1976 the District Court granted summary judgment in favor of all plaintiffs. (J.A. Vol. I, p. 133a). An

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[10] For several years this case was consolidated with a similar suit against American Airlines.

interlocutory appeal was taken from this ruling. (*Id.* p. 135a). During the pendency of that appeal (on April 1, 1977), IFFA came into existence and under the Railway Labor Act election procedures became the new collective bargaining representative of TWA flight attendants. (J.A. Vol. II, p. 85).

In August of 1978 the Seventh Circuit reversed the District Court again. [IFFA Pet. at 40a; published sub nom. *In re Consolidated Proceedings in the Airline Cases*][11] The Court of Appeals held that the claims of approximately 92% of the purported class are jurisdictionally barred.[12] These individuals were terminated more than ninety days prior to the filing date of the EEOC charge, and hence could not comply with the time limit in 42 U.S.C. § 2000e-5(d). Counsel for the class argued that TWA had waived its time limits defense pursuant to the aborted settlement agreement. The Seventh Circuit disposed of this argument by stating:

> The plaintiffs argue that the employer's statements at a March 17, 1972 settlement hearing constitute an express waiver of the filing requirement issue. Although it is questionable whether any concessions made at a settlement hearing should be held to constitute a waiver when the settlement is subsequently overturned, we need not reach this question as our conclusion that this filing requirement was jurisdictional precludes a finding of waiver. [IFFA Pet. at 57a.]

As previously noted, Plaintiffs and TWA each sought certiorari to review the Seventh Circuit's judgment in *Consolidated*. While those petitions were pending they negotiated a settlement whose legality is the subject of No. 80-951.

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[11] All the class representatives are included among the group whose claims are jurisdictionally barred.

[12] The time period is now 180 days. See, 42 U.S.C. § 2000e-5(e) (1972).

SUMMARY OF ARGUMENT

I.A. In its settlement with Plaintiffs TWA purported to bargain away rights which it did not own, namely, the competitive status seniority of its flight attendant employees. By entering into a collective bargaining agreement with IFFA as the statutory representative of those employees whereby TWA relinquished its control over those elements of the employment relationship which depend on the relative seniority of employees. TWA remains free to settle the case by offering the Plaintiffs $3 million or any larger amount which TWA owns; but it cannot diminish its own potential monetary liability by granting to Plaintiffs competitive status seniority inconsistent iwth the TWA-IFFA contract.

B. In settling the litigation between Plaintiffs and TWA at the expense of IFFA and the incumbent flight attendants, the courts below entered "a non-consensual consent decree." *High v. Braniff Airways, Inc.*, 592 F. 2d 1330, 1335 (5th Cir. 1979). This, of course, they lacked power to do, since the distinction between settlement and litigation is fundamental.

C. The court below relied on *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976) but that precedent cuts decisively against the challenged judgment. The point of *Franks* was that contractual seniority provisions may be overridden in favor of individuals who are entitled to such relief as the victims of discrimination. In the present case this essential condition of the exercise of the Court's remedial authority under § 706 of the Civil Rights Act has not been met.

D. The judgment below is contrary to the policies of Title VII itself, and to the national labor policy which favors the products of collective bargaining. As part of the compromise which resulted in enactment of the Civil Rights Act, § 703(h) gave "special treatment" (*Hardison*, 432 U.S. at 81) to different terms and conditions of employment pursuant to a *bona fide* seniority system. That Congressional decision is undermined by overriding the provisions of a *bona fide* seniority system such as that

in this case. Furthermore, the national labor policy as embodied in the RLA prescribes the procedures which TWA and IFFA must follow in negotiating and changing collective bargaining agreements. The judgment below allows TWA to change the contractual seniority rules without complying with those procedures.

E. The judgment below violates the Fifth Amendment. First, it took away from "A" (IFFA and the incumbent flight attendants) and gave to "B" (the Plaintiffs) the competitive status seniority and attendant benefits provided under the collective agreement. Cf. *Davidson v. New Orleans*, 96 U.S. 97, 102 (1877). Second, IFFA had "a right guaranteed to [it] by the Due Process Clause" to determine for itself whether to join in the settlement which TWA and Plaintiffs had negotiated, or whether to litigate any issue of "rightful place" which plaintiffs might raise. *United States v. Armour*, 402 U.S. 673, 682 (1971). Finally, by forcing the settlement on IFFA and depriving it of its contractual rights, the courts below have denied to IFFA "due process in the primary sense—* * * an opportunity to present its case and be heard in its support." *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 681 (1930).

II. The judgment below must be set aside for the additional reason that the courts did not have jurisdiction to enter it. The Seventh Circuit correctly determined in the *Consolidated* opinion, that the Class B plaintiffs did not satisfy the jurisdictional requirements of Title VII. If a line between "limitation" and "jurisdiction" must be drawn, the failure of 92% of the Plaintiff Class to comply with Title VII's filing requirements is jurisdictional, because the basis of the requirement Congress granted the federal courts' *power* under Title VII only after the prescribed proceedings before the EEOC have been followed. The courts below erred in allowing jurisdiction to be conferred by consent. The present case is like *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977) in that those Plaintiffs have failed to make a timely charge, and any allegedly discriminatory conduct against them must be treated as lawful.

ARGUMENT

I. THE COURTS BELOW ERRED IN OVERRIDING CONTRACTUAL SENIORITY RIGHTS IN THE GUISE OF "SETTLING" THE LITIGATION BETWEEN PLAINTIFFS AND TWA.

A. TWA, Having Agreed with the Union to Establish Competitive Seniority Rights, Could Not Destroy Those Rights Without the Union's Consent.

An initial and fundamental objection to the judgment below is that it permitted Defendant TWA to bargain away to the Plaintiffs rights which TWA did not own, namely, the competitive seniority rights of its incumbent flight attendants.

Absent a union representing its flight attendants, TWA would have had virtually unfettered freedom to grant or deny credit for length of service and attendant benefits; for in the absence of statute, "mere employment independent of the contractual conferring of special benefits upon those who have longest service records with the individual employer, creates no rights of seniority in retention in service or in reemployment." *Elder v. New York Central R.R. Co.*, 152 F.2d 361, 364 (6th Cir. 1945). This proposition is simply a corollary of the sweeping control which employers enjoy over unorganized employees. As this Court explained in *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1960):

> Collective bargaining agreements regulate or restrict the exercise of management functions; they do not oust management from the performance of them. Management hires and fires, pays and promotes, supervises and plans. All these are part of its functions, *and absent a collective bargaining agreement, it may be exercised freely except as limited by public law* and by the willingness of employees to work under the particular unilaterally imposed conditions. [263 U.S. at 583 (emphasis supplied).]

Accordingly, barring legislation not here involved, seniority rights derive their scope and significance from union contracts. *Aeronautical Lodge v. Campbell*, 337 U.S. 521; *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

Here, TWA's flight attendants exercised their right under § 2, Fourth of the Railway Labor Act ("RLA") "to organize and bargain collectively through representatives of their own choosing," and have, by election, determined that IFFA shall be that representative. See p. 15, *supra*. Following the procedures prescribed by the RLA, TWA and IFFA entered into a collective bargaining agreement, the terms of which provide, *inter alia*, seniority rights to the flight attendants, including "competitive status" seniority. That concept, as well as the concept of "benefit" seniority (which is involved in the settlement, but which is not at issue in IFFA's challenge thereto was explained in *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976):

> Seniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this Nation. S. Slichter, J. Healy, & E. Livernash. The Impact of Collective Bargaining on Management 104-115 (1960). Seniority principles are increasingly used to allocate entitlements to scarce benefits among competing employees ("competitive status" seniority) and to compute noncompetitive benefits earned under the contract of employment ("benefit" seniority). *Ibid.* We have already said about "competitive status" seniority that it "has become of overriding importance, and one of its major functions is to determine who gets or who keeps an available job." *Humphrey v. Moore*, 375 U.S. 335, 346-347 (1964). "More than any other provision of the collective [-bargaining] agreement . . . seniority affects the economic security of the individual employee covered by its terms." Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 75 Harv. L. Rev. 1532, 1535 (1962). "Competitive

status" seniority also often plays a broader role in modern employment systems, particularly systems operated under collective-bargaining agreements:

> "Included among the benefits, options, and safeguards affected by competitive status seniority, are not only promotion and layoff, but also transfer, demotion, rest days, shift assignments, prerogative in scheduling vacation, order of layoff, possibilities of lateral transfer to avoid layoff, 'bumping' possibilities in the face of layoff, order of recall, training opportunities, working conditions, length of layoff endured without reducing seniority, length of layoff recall rights will withstand, overtime opportunities, parking privileges, and, in one plant, a preferred place in the punch-out line." [424 U.S. at 766-767, citation and footnotes omitted.]

In quoting *Humphrey v. Moore*, *supra* at 346-347, the foregoing passage in *Franks* recognizes the "overriding importance" of "competitive status seniority". See also *Teamsters v. U.S.*, 431 U.S. 324, 343-344 (1977); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 80-81 (1977); *California Brewers Assn. v. Bryant*, 444 U.S. 598, 610 (1980).

The agreement between IFFA and TWA also well exemplifies what the Court observed in *Bryant*, *id.* at 608: "Seniority systems, reflecting as they do, not only the give and take of free collective bargaining, but also the specific characteristics of a particular business or industry, inevitably come in all sizes and shapes." The seniority provisions of the agreement between IFFA and TWA are more fully described in the Statement of the Case, pp. 6 to 11, *supra*. But because of their centrality to this case it is well to call special attention to certain of the most valuable competitive status seniority rights under that agreement, which TWA would nullify in order to "settle" the Plaintiffs' claims against it:

a) Protection against furlough (layoff) and priority for recall—Article 10(B), 12(B), 12(F);

b) Protection against displacement (bumping to lower classifications and other domiciles) in order to avoid furlough—Article 12(B);

c) Preferential choice for transfer to different domiciles and work classification (including promotions)—Article 13(A) and LETTER 2;

d) Monthly preference of run selections (flight schedules) which determine rest days and times, number of days worked, days and times of work, overtime hours and earnings—Article 18-A (D)(5) and 18-B (D)(5).

Having substantially relinquished its common-law control over discharge, recall, promotions, scheduling, and the like, on the basis of competitive status seniority of incumbent flight attendants as provided in its contract with IFFA, TWA then entered into negotiations with the attorneys for the Plaintiffs in this case. And as part of that settlement TWA agreed, subject to court approval, to bestow upon the Plaintiffs competitive status seniority superior to that of the incumbents and wholly inconsistent with their collective bargaining agreement. This portion of the agreement cost TWA nothing; it was wholly at the expense of the incumbent flight attendants, whose competitive status seniority, with its attendant benefits, was subordinated to those of the Plaintiffs. The precise consequences to the incumbents cannot be determined with certainty, in part because they depend on the vicissitudes of TWA's business—most significantly on the number of flight attendants employed at any given time, and because the settlement agreement purports to override all future collective bargaining agreements which TWA might enter into—but they are serious indeed. See pp. 7-11, *supra*. TWA also contributed three million dollars, to be divided equally among Sub-Classes A and B, a figure which, while substantial on its face,

pales into insignificance compared with TWA's potential financial obligation for back pay if it were ultimately determined that both Sub-Classes A and B were entitled to prevail on the merits.[13] In turn, the primary inducement for the Plaintiffs, particularly those in Sub-Class B who, being a larger group, would receive approximately between $175 and $225 per year of lost employment (assuming that its attorneys receive the $600,000 contemplated by the settlement) was the grant of seniority at the incumbent flight attendants' expense.

Of course, TWA properly denied any liability on its part, and TWA, like both Plaintiff Sub-Classes, inevitably considered the prospects of the ultimate outcome if the action between those parties was litigated to conclusion. Absent other considerations of public policy which are not immeidately relevant, TWA was free to settle with the Plaintiffs, and to limit its own financial exposure, as long as the consideration which it provided to the plaintiffs was limited to rights and property which TWA still possessed. Thus, TWA could agree to give the Plaintiffs three million dollars or some other larger sum of its own, and IFFA would have had no objection; nor could it have, since neither it nor the incumbent flight attendants whom it represented would have been adversely affected. But what TWA could not do, was to offer as consideration to the Plaintiffs the competitive status seniority rights which it no longer possessed because of the IFFA-TWA agreement. That is simply robbing Peter to pay Paul.

Nor did the Court below have authority to enter a judgment at TWA's behest which had this effect. The Court of Appeals said, "The right to have its objections heard does not, of course, give the intervenor [IFFA] the right to block any settlement to which it objects." (IFFA Pet. 9a) The Court of Appeals thereby completely

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[13] TWA also agreed to give the Plaintiffs certain "benefit seniority", which created some additional cost to TWA, but not at the expense of the incumbents. See p. 4, *supra*.

misstated the issue. For it is not by virtue of its intervention, but because it had substantive contractual rights that IFFA was entitled to reversal of so much of the proposed "settlement" between TWA and Plaintiffs as would undermine, or even nullify, those contractual rights. Erroneously viewing the case before it as being merely a matter of the fairness of that settlement between the plaintiffs and the defendants to be determined in accordance with the general policy favoring settlements, the Court of Appeals found in "the district court's actions in approving the settlement and in granting retroactive seniority, * * * no abuse of discretion." (*Id.*, 10a)

The Court of Appeals thereby simply avoided the crucial question of whether there was any statutory basis for a judgment which purported to transfer IFFA's contractual rights to the Plaintiffs, and if so, whether such a statute would be constitutional. Indeed, the course followed below is so palpably a violation of IFFA's rights under the Due Process Clause of the Fifth Amendment, see particularly *Davidson v. New Orleans*, 96 U.S. 97, 102 (1877) and *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 681 (1930) quoted respectively at pp. 35 and 36, *infra*, that we would turn immediately to the constitutional infirmities of the judgment below, but for the "one doctrine more deeply rooted than any other in the process of constitutional adjudication, [which] is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." quoted in *New York Transit Authority v. Beazer*, 440 U.S. 568, 582 (1979). Here, there are several "statutory grounds [which are indeed) dispositive" even if one puts aside the glaring fact that TWA purported to grant to the Plaintiffs that which it had previously bargained away to IFFA.

B. The Court Was Without Power to Impose a "Settlement" On IFFA Without Its Consent.

The courts below overrode the competitive status seniority provisions of the TWA-IFFA contract on the basis that it was a fair "settlement". But IFFA never agreed to, and in fact seriously objected to that portion of the "settlement". What thus resulted was what the Fifth Circuit has accurately and succinctly described as:

> "a nonconsensual consent decree. As such it cannot stand."

High v. Braniff Airways, Inc., 592 F. 2d 1330, 1335 (5 Cir. 1979). The circumstances of the *High* case are so closely comparable to those in this case, and the reasoning of the Fifth Circuit is so sound, that it merits extensive quotation:

> Assuming that Teamster jobs and seniority are affected by the latter subparagraphs of Paragraph 15, [of the settlement agreement] we must now determine whether the procedure followed by the court below—that of imposing on the Teamsters over their objection an expanded Appendix H about which they were not consulted—was proper under the provisions of the consent decree *or otherwise*. For several reasons, we conclude that it was not proper under the decree.
>
> In the first place, the decree was contemplated to be a *consent* decree. Obviously, this implies consent given at some point, at least, to all of its significant provisions.
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> • • • •
>
> It is inconceivable to us that Teamsters could have intended to empower Braniff, the plaintiffs, and EEOC to work such a theoretically unlimited fruit-basket turnover in their bargaining unit without further consultation and concurrence by them as to the number, location, or type of jobs to be affected and the individuals to be preferred by Paragraph 15 over other Teamster members, some of them doubtless themselves members of minorities.
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> • • • •

> Nor do we think the revised Appendix H was properly imposed on a nonconsensual basis. Of course, it is entirely appropriate for parties to such arrangements as these to agree on as much as they can and call upon the court to decide the rest. *See Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978) (appeal pending). When this is properly done, what results is a partially consensual and partially litigated decree. In such an event, however, the litigated portion constitutes a judgment and must stand or fall on appeal like any other. *Id.* Considering revised Appendix H as such a judgment, we find that it cannot stand. [592 F.2d at 1334-1335, emphasis in original]

The foregoing analysis, while not of course binding on this Court, comports fully with the distinction which this Court has drawn between consent decrees and litigated judgments. In *United States v. Armour & Co.*, 402 U.S. 673 (1971) this Court explained:

> [The government's] argument would have great force if addressed to a court that had the responsibility for formulating original relief in this case, after the factual and legal issues raised by the pleadings had been litigated. It might be a persuasive argument for modifying the original decree, after full litigation, on a claim that unforeseen circumstances now made additional relief desirable to prevent the evils aimed at by the original complaint. Here, however, where we deal with the construction of an existing consent decree, such an argument is out of place.
>
> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might

> have won had they proceeded with the litigation. Thus the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation. [681-682, emphasis in original, footnote omitted.]

In *Armour*, the Court observed that it had "recognized these principles before" (*id.* at 682). It there relied on two prior cases involving the scope of consent decrees, *Hughes v. United States*, 342 U.S. 353 (1942) and *United States v. Atlantic Refining Co.*, 360 U.S. 19 (1959). In both those cases the Court denied to the United States relief under a consent decree which it had not obtained through litigation of the merits of the controversies which had been settled by those consents. (See 402 U.S. at 682-683.) In the present case, the Court below went a major step further than this Court refused to go in *Hughes*, *Atlantic* and *Armour*: It imposed a settlement on an unwilling third party and granted to the plaintiffs relief which they might, or might not have obtained in litigation.[14] While the Court below was plainly aware of the difference between settlement and litigation, and was heavily influenced, to say the least,

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[14] Thus the rights of the defendants in those cases were afforded greater protection than IFFA received from the lower courts in this case.

by a preference for the former, it ignored the critical distinction between settlement and litigation—the presence or absence of consent. Here, IFFA did not consent to a settling away of its contractual rights, and the Courts below were without power to impose their views of fairness and public policy on IFFA. (See IFFA Pet. 9a).

C. The Judgment Below Is Without Statutory Support

The only statutory support advanced by the Court of Appeals for affirming the District Court's Order was a general reference to Title VII of the Civil Rights Act. The Court of Appeals said:

> The Supreme Court in *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976) held that granting of retroactive seniority is ordinarily appropriate in Title VII cases:
>
> > [D]istrict courts should take as their starting point the presumption in favor of rightful-place seniority relief, and proceed with further legal analysis from that point; and that such relief may not be denied on the abstract basis of adverse impact upon interests of other employees but rather only on the basis of unusual adverse impact arising from facts and circumstances that would not be generally found in Title VII cases. *Id.* at 780. [IFFA Pet. 10a][15]

In thus relying on *Franks* the Court of Appeals completely misapplied that precedent. For the central issue in *Franks* was the scope of judicial power to remedy violations of Title VII of the Civil Rights Act, and, of most immediate significance: "whether an award of seniority relief is appropriate under the remedial provisions of Title VII, specifically, § 706(g)." (*Id.* at 762). This Court answered that question of remedial power in

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[15] The Court of Appeals inadvertently miscited the passage which it quoted from *Franks*, and which actually appears in 424 U.S. at 779, n. 41.

the affirmative. The purely remedial character of 706(g) appears clearly from its language, which the Court set forth immediately after stating the quoted question:

> *If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice* charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. . . . [424 U.S. at 762-763, n. 19, emphasis supplied]

The Court's reasoning on the propriety of seniority relief, which appears primarily in Part III of its Opinion, need not be elaborated here; it suffices to note that the heart of its analysis (including the discussion of competitive status seniority quoted earlier in this brief) is addressed to the problem of making whole the actual victims of discrimination.

The passage quoted by the Court of Appeals in its Opinion in the present case does not expand *Franks* beyond its holding as to the scope of the appropriate remedy for a violation; indeed, the word "relief" as used twice in that passage appears to be synonymous with "remedy". See 424 U.S. at 779, n.41 and the accompanying text. And it is clear from this portion of the Court's Opinion (Part V) that its function as well as that of the immediately preceding portion, Part IV, is to *qualify* (although only to a limited extent) rather than *enlarge* the basic holding of Part III that retroactive seniority relief is available under § 706(g) *to remedy violations which have been found by the Court.* In other words, Parts IV and V are the Court's response

to the objections of the separate opinions that the majority's holding too narrowly circumscribes the equitable discretion of the lower courts in formulating appropriate remedies. The paragraph relied on by the Court of Appeals herein is addressed explicitly to that point. That paragraph, and the entire *Franks* opinion, are distorted beyond recognition by treating them as a holding that parties may be granted retroactive seniority in the absence of a finding that they have been victims of a violation of Title VII.

In short, what was said in *United Air Lines, Inc. v. Evans*, 431 U.S. 553 is equally true here:

> Our decision in *Franks v. Bowman Transportation Co., supra*, does not control this case. In *Franks* we held that *retroactive seniority was an appropriate remedy to be awarded under § 706(g) of Title VII*, 42 U.S.C. § 2000e-5(g) (1970 ed., Supp. V), *after an illegal discriminatory act or practice had been proved*, 424 U.S., at 762-768. When that case reached this Court, the issues relating to the timeliness of the charge and the violation of Title VII had already been decided; we dealt only with a question of remedy. [*Id.* at 558-559, footnotes omitted; emphasis added.]

So too, in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, the Court said:

> In *Franks* we held that it was permissible to award retroactive seniority to victims of past discrimination in order to implement the strong congressional policy of making victims of discrimination whole. *Franks is not dispositive of the present case since there is no evidence of past discrimination that must be remedied.* Not only is the "make-whole" policy not present in this case, but, as we shall see, the strong congressional policy against discrimination in employment argues against interpreting the statute to require the abrogation of the seniority rights of some employees in order to accommodate the religious

needs of others [432 U.S. at 79, n.12, emphasis added. See also *id.* at 82-83, n.13.]

In this case, of course, no acts of discrimination have been "proved" (*Evans, supra*). The very presence in this Court of Nos. 78-1545 and 78-1549 on grants of certiorari to review the Seventh Circuit's earlier judgment in favor of some and against others of the respondent Plaintiffs makes that clear enough. And, as already noted, one of the principal purposes of the parties to the settlement agreement was to avoid an ultimate resolution as to whether there were any violations, and if so, what individuals may obtain relief therefor under Title VII. Indeed, the settlement agreement itself, which the District Court approved (IFFA Pet. 16a-17a) provides:

> The parties hereto agree that the execution of this Agreement by TWA is not and shall not be construed as an admission by it or deemed to be evidence of the validity of any such claims or its liability for any such claims or of any unlawful acts by it whatsoever, nor shall this Agreement or any of the terms hereof be offered or received in evidence in any civil or administrative action or proceeding as an indication of wrongdoing by TWA or of its legal position in this or other litigation. TWA expressly disclaims any liability in these lawsuits and states that it is entering into this Agreement to avoid further expenses, inconvenience and the distraction of burdensome and protracted litigation. [*Id.* at 25a]

D. The Judgment Below Is Contrary To Two Federal Statutes.

It is sufficient to require reversal of the order below insofar as it sets aside the provisions of the TWA-IFFA contract that that judgment is without statutory support. *A fortiori* that judgment cannot stand because it is actually inconsistent with the pertinent Acts of Congress. These are Title VII of the Civil Rights Act,

when properly understood, and the Railway Labor Act (hereafter "RLA").[16]

Section 703(h) of the Civil Rights Act gave "special treatment" (*Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 81, 1977), to "different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race . . . or national origin. . . ." *Franks* decided that notwithstanding § 703(h), seniority relief could be given to actual victims of discrimination.[17] But as we have previously shown, the Court in both *Evans* and *Hardison* distinguished *Franks*, and held that under § 703(h) seniority rights are entitled to prevail except where they must be subordinated to provide victims of discrimination with a make-whole remedy. See also the thorough discussion in *Teamsters v. United States*, 431 U.S. 324, 343-356 (1977) where the Court concluded that, "the unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII." (*Id.* at 352). Nevertheless, to the extent that it superseded the provisions of the IFFA-TWA agreement, the judgment below treats them as if they were unlawful. By depriving the incumbent flight attendants of their competitive status seniority, and the benefits which flow

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[16] See also the brief *amicus curiae* for the American Federation of Labor and Congress of Industrial Organizations which elborates this argument in greater detail.

[17] See in addition to the portions of the *Franks* opinion already discussed, Part II, 424 U.S. at 757-762, which deals most directly with § 703(h). As this Court said:

> There is no indication in the legislative materials that § 703(h) was intended to modify or restrict relief otherwise appropriate *once an illegal discriminatory practice occurring after the effective date of the Act is proved*—as in the instant case a discriminatory refusal to hire. [*Id.* at 761-762, emphasis added]

therefrom under the contract, the Court substituted its own values (favoring "settlement" at no matter whose cost) over the Congressional policy embodied in § 703 (h). That policy, as the *Teamsters* opinion developed fully (431 U.S. at 350-352) was an essential part of the compromise which made possible the enactment of any Title VII.

Additionally, the judgment below in this respect conflicts with another major element of the national labor policy, that which favors free collective bargaining. The close relationship between these two policies was explained in *California Brewers Assn. v. Bryant*, 444 U.S. 598 (1980)

> Congress passed the Civil Rights Act of 1964 against the backdrop of this Nation's longstanding labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment. See generally *Steelworkers v. Weber*, 443 U.S. 193. It does not behoove a court to second-guess either that process or its products. *Porter Co. v. NLRB*, 397 U.S. 99. Seniority systems, reflecting as they do, not only the give and take of free collective bargaining, but also the specific characteristics of a particular business or industry, inevitably come in all sizes and shapes. *See Ford Motor Co. v. Huffman*, 345 U.S. 330; *Aeronautical Lodge v. Campbell*, 337 U.S. 521. [444 U.S. at 608][18]

The statute which embodies the national labor policy favoring collective bargaining which governs the employers and union here is the Railway Labor Act, because TWA is a carrier by air, to whom the RLA is ap-

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[18] In *Steelworkers v. Weber*, 443 U.S. 193 (1979), the majority of the Court sustained an "affirmative action" program which had been agreed upon by an employer and a union, against the contention that that program was prohibited by Title VII.

plicable by virtue of § 201 thereof, 45 U.S.C. § 181.[19] Section 202 of the RLA, 45 U.S.C. § 182 imposes on such carriers by air and their employees the same duties, requirements, penalties, benefits and privileges described by § 2 (among others) of the RLA. Section 2, Seventh provides in full:

> No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act [45 U.S.C. § 156].

Seniority provisions are within "the words 'rules, or working conditions of its employees, as a class as embodied in agreements' " *Railway Clerks v. Florida E. C. R. Co.*, 384 U.S. 238 at 245 (1967). Yet the judgment below allows TWA to change the contractual seniority rules without complying with the procedures established by the RLA.

This result is directly opposed to that which was reached by the Fifth Circuit in *Myers v. Gilman Paper Corp.*, 544 F. 2d 837 (1977). There, although elaborate findings of actual past discrimination has been made and sustained, the Fifth Circuit held:

> regardless of past wrongs, a court in considering prospective relief is not automatically empowered to make wholesale changes in agreements negotiated by the employees' exclusive bargaining agents in an obviously serious attempt to comply with Title VII. Allowing such changes without findings of inadequacy in the revised agreements would conflict with the policies reflected in the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA"). [544 F. 2d at 857]

Drawing heavily on this Court's decision in *Emporium Capwell Co. v. Community Org.*, 420 U.S. 50 (1975) the Fifth Circuit observed:

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[19] In this respect there is no difference between the policies of the National Labor Relations Act and those of the RLA.

> We are reminded that while Title VII expresses an important national policy, it does not exist in a vacuum. Important national policies also emanate from the NLRA, among them the principle that terms and conditions of employment are to be shaped by the employer and the exclusive bargaining representative of its employees. [*Id.*]

A major element of the national labor policies which was deemed controlling in *Emporium Capwell* is the principle of majority rule. (See 420 U.S. at 62-70.) The "settlement" between the employer and the present plaintiffs circumvened the process of collective bargaining between the employer and the majority representative which is required by the RLA. To be sure, the terms of the RLA do not expressly address litigation between a group of minority plaintiffs or the settlement of such litigation. But it by no means follows that the policies of the RLA may simply be destroyed in those circumstances, as they were by the Seventh Circuit in this case. As the Fifth Circuit reasoned in *Gilman Paper*:

> *Emporium Capwell*, of course, did not involve negotiations in the context of a pending Title VII action. Obviously, when some of the employees become plaintiffs in a Title VII action, they acquire a status as litigants to discuss with the employer and the union the grounds upon which they are willing to settle their lawsuit. But the teachings of *Emporium Capwell* have application to the court's proper role in adjudicating Title VII actions. And the circumstances of this case point to one such application: a court may not allow the substitution of a solution for past discrimination negotiated between the employer and the plaintiffs for that achieved through collective bargaining unless it first determines that the collectively bargained solution either violates Title VII or is inadequate in some particular to cure the effects of past discrimination. [544 F.2d at 858]

And where, as here, there has been no negotiation between the employers and the statutory representative,

the Court is without authority—and violates national labor policy—by substituting its own seniority terms for those which were collectively bargained by the parties to whom the RLA assigns that power and responsibility.[20]

E. The Judgment Below Denies Petitioner Due Process of Law.

1. In the celebrated case of *Davidson v. New Orleans*, 96 U.S. 97 (1877), the Court undertook a thorough consideration of the meaning of the phrase "due process of law" as it appears in the Constitution.[21] While there have been differences within the Court as to whether the *Davidson* opinion gave to the Due Process Clause its full intended scope under the Fourteenth Amendment, one proposition there announced is beyond debate:

> It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law, within the meaning of the constitutional provision. [96 U.S. at 102]

Yet the judgment below took away from IFFA and the incumbent flight attendants and gave to plaintiffs the competitive status seniority and attendant benefits which

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[20] The lower courts' interference with the policies of the RLA is aggravated by their approval of that portion of the settlement agreement which purports to override not only prior and current but "*future* labor agreements" (IFFA Pet. 37a, emphasis added). Thus, any future settlement governing competitive status seniority will be subject to the terms of the settlement agreement, rather than collective bargaining between TWA and IFFA as provided by Congress, particularly in § 6 of the RLA, 45 U.S.C., § 156.

[21] While the *Davidson* inquiry was prompted by the enactment of the Fourteenth Amendment, the Court's discussion, to the extent relevant here, pertains equally to the due process clause of the Fifth Amendment. See, *e.g.*, *Id.*, referring to *Murray's Lessee, et al. v. Hoboken Land & Improvement Co.*, 18 How. (59 U.S. 272, 1855).

they enjoyed under the collective bargaining agreement between TWA and IFFA. It did so, as we have seen, without any basis in statute, or other public law.[22]

2. In addition to the foregoing violation of its substantive due process rights, IFFA was denied procedural due process by the proceedings below. The lower courts purported to determine that approval of the settlement agreement "would not have an unusual adverse impact on currently employed flight attendants." (See IFFA Pet. 10a). As we have shown previously, that statement is not only clearly erroneous on the record which was actually made in the District Court, but has been shown by subsequent events to have grievously underestimated the actual impact on the incumbent flight attendants in light of subsequent events. And of course that assertion does not even address IFFA's rights under the contract or its statutory right that the procedures of the RLA be followed prior to any change in the agreement by TWA. But an even more serious vice of the judgment below is that it imposes a settlement on IFFA, rather than allowing IFFA to determine for itself whether to accept the settlement which TWA and Plaintiffs had rejected. See Point IB, *supra*. The *Armour* case, which we there quoted at length, articulated the

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[22] Two additional points bear mention in this context: 1) As *Davidson* explained, the phrase, "due process of law" has its historic origin in the phrase "law of the land" as it appeared in the Magna Carta, and meant "the ancient and customary laws of the English people, or laws enacted by the Parliament of which those barons were a controlling element." (96 U.S. at 102). The federal courts, unlike the state courts, do not have general common law jurisdiction, but are empowered to make law only in very special circumstances, none of which can even remotely authorize the abrogation of the IFFA's contract. See *Northwest Airlines, Inc. v. Transport Workers*, 49 U.S. L. Week, 4383, 4388 (U.S., April 20, 1981); *Milwaukee v. Illinois*, 49 U.S. L. Week, 4445, 4447-4449 (U.S., April 28, 1981); *Texas Industries v. Radcliff Materials, Inc.*, 49 U.S. L. Week, 4538, 4540 (U.S., May 26, 1981).

proposition—which would appear to be self-evident—that IFFA is entitled to decide for itself whether to settle or litigate. And *Armour* bears special emphasis because it affirms that the "right to litigate the issues raised [in an action is] a right guaranteed * * * by the Due Process Clause" * * * (402 U.S. at 682).

Lastly, as we have shown, *Franks* and its progeny establish that a court may override contractual status seniority provisions only in favor of individuals who have been determined to have been victims of a violation of Title VII, and who are otherwise entitled to such relief in accordance with that statute. In this case, however, the courts below have taken such action without making such a determination, and without even permitting IFFA to litigate whether the legal conditions for such relief have been met. By limiting their consideration to the fairness of the settlement agreement *qua* settlement, the courts below withheld from IFFA the right to litigate whether the plaintiffs had satisfied the legal conditions for overriding the seniority provisions of the contract. These courts thereby—denied to IFFA "due process in the primary sense,—* * * an opportunity to present its case and be heard in its support." *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 681 (1930) (Brandeis, J.)

II. THE PRIOR DETERMINATION THAT JURISDICTION IS LACKING PRECLUDES THE APPROVAL OF THE SETTLEMENT AND THE GRANT OF SENIORITY

A. The Settlement Agreement Has Improperly Allowed The Plaintiffs And TWA To Confer Jurisdiction For Their Own Limited Purposes

This settlement presents a conflict between judicial policies favoring settlement and the principle that federal courts are courts of limited jurisdiction. The District Court and Seventh Circuit have held that the policies favoring settlement allow a court to act despite a finding of a lack of subject matter jurisdiction. We disagree.

In the *Consolidated* opinion (IFFA Pet. at 40a) the Seventh Circuit held that the District Court had no subject matter jurisdiction over the claims of 92% of the putative class. Under familiar plinciples:

> This ruling was binding upon the District Court and the Circuit Court of Appeals as to changed circumstances arising after the order of confirmation and prior to our decision. When matters are decided by an appellate court, its rulings, unless reversed by it or a superior court, bind the lower court. Thus a cause proceeds to final determination. [*Insurance Group v. D. & R.G.W.R. Co.*, 329 U.S. 607, 612]

Notwithstanding the Court of Appeals opinion in *Consolidated*, the District Court exercised jurisdiction to its fullest. First, it approved a settlement of all claims, including those held to be jurisdictionally defective, under the authority of Rule 23(e) of the Federal Rules of Civil Procedure. Pursuant to the terms of the settlement, the District Court ordered that the settlement supersede the collective bargaining agreement between IFFA and TWA. It ordered that all Plaintiffs be granted full retroactive competition seniority. Further, the District Court "retained jurisdiction" to adjudicate and enforce the settlement, and to determine and award fees to attorneys for the class.

The District Court did not say whether it thought jurisdiction existed. Instead it emphasized that *Consolidated* was not final, and that a settlement was necessary:

> Contrary to the Union's assertion, the filing of the Consolidated opinion with the Clerk of the Seventh Circuit does not constitute a final judgment order, and this court is therefore not presently forbidden from exercising its jurisdiction over the claims of Subclass B members. To paraphrase Mr. Justice Stevens in United Airlines v. Evans, 431 U.S. 553 (1977), the mere entry of the Consolidated decision is an event from which no legal consequences flow until such time as the requisite mandate issues. [IFFA Pet. p. 15a]

The Seventh Circuit affirmed. It did not alter its previous opinion that jurisdiction is lacking. Rather it held that the District Court could approve the settlement and grant seniority overriding the contract because of the importance of settlement:

> We do not share the view, under the circumstances, of this case, that the parties' agreement is tantamount to an attempt to confer subject matter jurisdiction by consent. [IFFA Pet. at 8a].

Later in the opinion the court added:

> We think the principles favoring settlement of class action lawsuits remain the same regardless of whether the disputed legal issues center on the jurisdiction of the court over the action. Where, as here, the jurisdictional question is not settled with finality, parties should not be forced to litigate the issue of jurisdiction if they can arrive at a settlement that is otherwise appropriate for district court approval. [IFFA Pet. at 9a].

Thus, the Seventh Circuit has held (1) that the District Court lacks jurisdiction; but that (2) the District Court may nonetheless exercise jurisdiction; as long as (3) the exercise of jurisdiction is somehow related to the goal of encouraging settlements; because (4) it is possible that the Supreme Court could hold that the Seventh Circuit's finding that the District Court lacks jurisdiction is wrong. We have been unable to unearth a single case which supports such circular reasoning. More importantly, the opinion reverses traditional concepts regarding the role and power of the federal judiciary.

It is elementary that the parties cannot confer jurisdiction upon a federal court. Only the Constitution and Congress can create jurisdiction. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 371-372 (1978). There is a presumption that jurisdiction is lacking until it has been demonstrated that jurisdiction exists. *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327, 337 (1895). Here, the courts below assumed that jurisdiction existed

for certain purposes despite a previous finding that it did not exist.

Jurisdiction cannot be provided by stipulation, consent, waiver, or conduct by the parties. *Mitchell v. Maurer*, 293 U.S. 237 (1934); *American Fire and Casualty Co. v. Finn*, 341 U.S. 6 (1951); *Sosna v. State of Iowa*, 419 U.S. 393 (1975). *People's Bank v. Calhoun*, 102 U.S. 256, 260-61 (1880). A challenge to the court's jurisdiction may be raised by anyone at any time, even by parties who stipulated to or argued for the existence of jurisdiction at one point, and raised the issue for the first time on appeal. *Mitchell v. Maurer, supra; Bialac v. Harsh Bldg. Co.*, 463 F.2d 1185 (9th Cir. 1972), *cert. denied*, 409 U.S. 1060 (1972); *Television Reception Corp. v. Dunbar*, 426 F.2d 174 (6th Cir. 1970). A court, whether trial or appellate, is obliged to inquire *sua sponte* into the jurisdiction of the district court, and to dismiss any claim once it is determined that the court lacks jurisdiction over it. *Mitchell v. Maurer, supra*; *City of Kenosha, Wisconsin v. Bruno*, 412 U.S. 507 (1973). The requirement of dismissal immediately following a determination of lack of jurisdiction also is built into Rule 12(h)(3) of the Federal Rules of Civil Procedure. Simply put, the law is that "the subject matter jurisdiction of the federal courts is too basic a concern to the judicial system to be left to the whims and tactical concerns of the litigants." 13 Wright, Miller and Cooper, *Federal Practice and Procedure*, § 3522 (West Pub. 1975).

Until now, there was also no doubt that the principle of limited subject matter jurisdiction likewise applied to court actions in connection with approval of settlements, class-action or otherwise. *See, United States v. Boe*, 543 F.2d 151, 158-159 (C.C.P.A. 1976); *Patterson v. Stovall*, 528 F.2d 108, 112 (7th Cir. 1976); *Fairfax Countrywide Citizens v. Fairfax County*, 571 F.2d 1299 (4th Cir. 1978), *cert. denied*, 439 U.S. 1047 (1978); *Jamison v. Butcher & Sherrerd*, 68 F.R.D. 479, 482, n. 1 (E.D.Pa. 1975); *McArthur v. Southern Airways*, 569 F.2d 276

(5th Cir. 1978).[23] *Patterson* and *Jamison* both make it clear that a court asked to approve a class action settlement must first determine if it has subject matter jurisdiction over the claims settled. In *Patterson*, for example, the Seventh Circuit said that, "[d]espite the withdrawal (of a motion to dismiss for lack of jurisdiction) the District Court would have no authority to approve the settlement had it lacked jurisdiction." 528 F.2d at 112, n.5.

Indeed, in an opinion in this very case the Seventh Circuit observed that settlements have no effect upon any lack of subject matter jurisdiction. *See Consolidated*, IFFA Pet. at 57a. When Plaintiffs argued that TWA had waived any timely-filing defense pursuant to the aborted first settlement, the Seventh Circuit held that a jurisdictional prerequisite could not be waived pursuant to a settlement. The inconsistency is obvious. In one opinion the Seventh Circuit held that parties to a settlement cannot waive a defense of a lack of jurisdiction; in another it held that it is not necessary to have jurisdiction in order to approve a settlement which alters the seniority rights of individuals who are not parties to the settlement.

Equally mystifying is the Seventh Circuit's statement that it does not agree that the settlement has allowed the parties to confer jurisdiction by consent. We are not told *why* this conclusion was reached. The opinion does acknowledge that pursuant to the settlement, "[T]he district court *was given* the *power to determine* the amount of competitive (union) seniority to grant to each woman." (IFFA Pet. at 4a, emphasis supplied). Jurisdiction *is* the power to determine. That is why Article III speaks of the judicial *power*. Without the settlement agreement, the court would not have had any power to determine seniority. Instead, it would have been bound by the hold-

[23] The Fifth Circuit has since held that the Title VII time limits are not jurisdictional. *See, Coke v. General Adjustment Bureau*, 640 F.2d 584 (5th Cir. (1981) (en banc).

ing in *Consolidated* and the literal command of Rule 12(h)(3) and compelled to dismiss the claim of each Sub-Class B member.

A settlement is, after all, both an agreement and a stipulation. Asking the court to approve and enforce the settlement, and to alter the rights of third parties pursuant to the settlement, is inviting the exercise of jurisdiction. In short, the parties to the settlement have agreed that the court could issue certain orders which it otherwise could not, due to the prior determination that jurisdiction is lacking. Thus, the only basis for the court's jurisdiction over the claims of Sub-Class B *is* the settlement agreement. In essence, the settlement agreement has been drawn to allow the parties to give jurisdiction for their own limited purposes. The jurisdiction of the court has been left to the whims and tactical concerns of the Plaintiffs and TWA, much to the dismay of the incumbent flight attendants.

We submit that the law is that a court which believes it has no jurisdiction over a claim can take no action but to dismiss that claim. A policy favoring settlements can never take precedence over a lack of jurisdiction. The principle of limited jurisdiction springs not from any "policy" but from Article III of the Constitution, which gives federal courts their power to act. It is only the existence of jurisdiction which allows the courts to formulate "judicial policies". The opinions below have, in effect, turned the process upside down.

B. The Rationale Of The Courts Below Allows The Class Action Settlement Procedures To Expand Jurisdiction

The rationale of both the District Court and Seventh Circuit is based upon the feeling that Plaintiffs and TWA *must* be allowed to settle and should not be "forced against their will" to proceed. Implicit within this reasoning are at least three incorrect assumptions: (1) the position of IFFA, if sustained, would prohibit a settle-

ment; (2) there cannot be a settlement without the assistance of the court; and (3) the class-action procedures in Rule 23 F.R.Civ.P. somehow enlarge the court's jurisdiction to act. The courts below ignored the fact that Plaintiffs and TWA need the aid of the court to alter the rights of incumbent employees who have not agreed to it pursuant to *this* settlement.

First, IFFA has never taken the position that there can be no settlement. We object only to the grant of retroactive seniority to the Plaintiffs and the overriding of IFFA's collective bargaining agreement. Indeed, if the parties had not used the settlement agreement to confer jurisdiction for the purposes of a seniority grant, there would have been no one objecting to the court's actions.

Second, there can be a settlement, with or without the court. Settlement without the Rule 23(e) approval procedure might be more difficult; it is certainly not impossible. Most settlements are handled out of court. Class members have already been asked to fill out claim forms; surely each Plaintiff could sign a release (which could even be printed on the back of the settlement check). Some Plaintiffs might refuse to sign, but that is hardly an extraordinary risk. It is quite comparable to a few class-members opting out of a court-approved class settlement. Thus, while the settlement approval provision in Rule 23(e) may be convenient, it is not indispensable.

More important, the Rule 23 class-action procedures have no affect upon the court's jurisdiction. The Seventh Circuit's opinion suggests the opposite in two ways: first, by implying that there must *be* a settlement and that there can be no settlement unless the District Court approves it pursuant to Rule 23(e); then by speculating if jurisdiction exists over the entire class by virtue of the fact that the District Court *has* jurisdiction over the claims of 8% of the supposed class. (IFAA Pet. at 8a, 9a). It has long been established that Rule 23 does

not affect jurisdiction and that in a class action the court must have jurisdiction over the claim of *each* plaintiff. *Snyder v. Harris*, 394 U.S. 332 (1969); *Zahn v. International Paper Company*, 414 U.S. 291 (1973). *Zahn* plainly states that "one plaintiff may not ride in on another's coattails." 414 U.S. at 301. See also Rule 82 which provides that the Federal Rules of Civil Procedure shall not be construed to extend the jurisdiction of the federal courts. The essence of Rule 23 is to provide a procedural mechanism for litigation of claims over which the court has jurisdiction; it does not create subject matter jurisdiction.

But the result of the opinion below is to allow a perceived necessity to approve a settlement under Rule 23(e) to take precedence over an unchanged finding of lack of jurisdiction. Insofar as the jurisdiction of the court is concerned, there is no conceivable basis for distinguishing between Rule 23(e) regarding class action settlement approval and the remainder of the Rule regarding maintenance of class actions. Accordingly, the effect of the decision is to allow Rule 23(e) to expand jurisdiction, a result forbidden by the Rules, the case law, and the Constitution.

Plaintiffs and TWA do not need the court to settle; they need the court to grant seniority and supersede the collective bargaining agreement. No settlement (without IFFA's assent) can grant seniority absent a court order, but the grant of seniority has nothing to do with class action settlement procedures. Any power to grant seniority superseding contract rights must come from Title VII, not Rule 23.

C. The Filing Of A Timely Charge With The EEOC Is A Jurisdictional Prerequisite To The Maintenance Of A Title VII Action

The Court may wish to decide the underlying jurisdictional question determined in *Consolidated* and posed in No. 78-1545: whether the filing of a timely charge with the EEOC is a jurisdictional prerequisite to the

maintenance of a Title VII action. Since we anticipate that Plaintiffs and TWA will address both sides of this issue at length, our comments will be brief.

This Court has described the requirement of filing a timely charge as jurisdictional on at least four occasions. *See, McDonell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973); *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 47 (1974); *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 240 (1976); and *United Airlines, Inc. v. Evans*, 431 U.S. 553, 557, n. 9 (1977). Lower courts have disagreed on the nature of the time limit.[24]

Much of the discussion in these cases centers upon an irrelevant issue: whether the requirement of filing a timely charge is a jurisdictional prerequisite or a statute of limitations. There is no reason it cannot be both. *See*, for example, *Robbins & Myers, supra*, where this Court referred to the time limit as both a "limitations period" and a "jurisdictional prerequisite" in the same paragraph. 429 U.S. at 240. In other areas, Congress has chosen to make an amount in controversy and diverse citizenship jurisdictional prerequisites. Certainly Congress can treat compliance with a statute of limitations in the same manner.

Second, the requirement of filing a timely charge with the EEOC before proceeding to court clearly is no ordi-

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[24] Cases which have held that the time limit is jurisdictional include *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 719 (7th Cir. 1969); *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979, 986 (D.C. Cir. 1973); *Terry v. Bridgeport Brass Co.*, 519 F.2d 806 (7th Cir. 1975); *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 246 (3rd Cir. 1975), *cert. denied*, 421 U.S. 1011 (1975); *Hinton v. CPC International, Inc.*, 520 F.2d 1312, 1315 (8th Cir. 1975); and *McArthur v. Southern Airways, Inc.*, 569 F.2d 276 (5th Cir. 1978). Cases which have held that the time limit is not jurisdictional and may be tolled include *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 475 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978); *Hart v. J. T. Baker Chemical Corp.*, 598 F.2d 829 (3rd Cir. 1979); and *Coke v. General Bureau of Adjustment*, 640 F.2d 584 (5th Cir. 1981). As is obvious from this list of cases, some circuits have vacillated on the issue.

nary statute of limitations. *Black's Law Dictionary* (Revised 4th ed., West Pub. 1968) defines a "statute of limitations" in part as a provision "declaring that no suit shall be maintained on such causes of action unless brought within a specified period *after the right accrued.*" (emphasis supplied). The right of a Title VII plaintiff to bring suit cannot accrue until *after* a timely charge has been filed with the EEOC. The time limit is more in the nature of a condition precedent to the right to sue, or as this Court has said, a "jurisdictional prerequisite." The court's jurisdiction depends on this prerequisite because the court's power to hear and determine the claim does not arise unless a timely charge has been filed.

Obviously, the right to bring suit for employment discrimination did not exist at common law. When Congress created this cause of action, it placed precise limits on the instances in which a federal court could hear and determine a claim of employment discrimination. A federal court cannot take cognizance of a private Title VII action until a plaintiff can demonstrate that she has filed a timely charge with the EEOC, and the EEOC has processed the charge and proffered to the plaintiff a notice of her right to sue. Similarly, a federal court cannot hear a diversity action unless the plaintiff can demonstrate diversity of citizenship and a minimum amount in controversy.

Third, we believe that treating the requirement of filing a timely charge with the EEOC as a jurisdictional prerequisite is in harmony with the legislative history.[25] A primary goal of Title VII is to secure voluntary compliance with the law. *Bowe v. Colgate-Palmolive Co.*,

[25] The circuits draw very different interpretations from the legislative history. The Seventh Circuit stated in *Consolidated* that "[W]e find nothing of significance to indicate that the 90-day filing requirement is not jurisdictional." (IFFA Pet. at 56a); whereas the District of Columbia Circuit stated in *Laffey* that, "Nothing in the legislative history compels us to treat these provisions as jurisdictional." 567 F.2d at 475.

supra, 416 F.2d at 719.[26] To this end Congress established a two-step process whereby the complainant first seeks relief through the conciliation process triggered by the timely filing of a charge with the EEOC. Only if such conciliation efforts fail may an action be brought in court.[27]

The procedures enacted give considerable protection to potential defendants.[28] They are assured that a charge of discrimination will be promptly filed, and that the charged party will be promptly notified; which in turn allows the charged party to voluntarily comply with the law and limit liability. In short, the entire statutory scheme is geared toward resolution out of court. A private lawsuit to remedy alleged discrimination is a last resort which can only be utilized when certain precise prerequisites are met. Where they are not met, the courts have no power to hear and determine the claim.

Moreover, the procedures which must be exhausted before bringing suit are *not* designed solely to protect *defendants*. They are, in the words of Congressman Lindsay, "designed to give due protection to *everyone*." [29] Certainly this would include innocent incumbent employees who might be asked to move over on behalf of alleged victims of discrimination. The requirement of filing a timely charge does much to limit the burden which incumbents may be forced to bear for the alleged victim. Allowing a defendant to accidentally waive the time limit defense not only for itself but also for the

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[26] See, for example, the comments of Congressman Lindsay at 110 Cong. Record 1638 (Feb. 1, 1964).

[27] See the comments of Senator Muskie at 110 Cong. Record 12617 (June 3, 1964); Senator Humphrey at 110 Cong. Record 12723 (June 4, 1964); and Senator Saltonstall at 110 Cong. Record 14191 (June 17, 1964).

[28] See the comments of Senator Morse at 110 Cong. Record 14190 (June 17, 1964): "In this instance, we have leaned over backward to protect the possible defendants by means of all the procedures referred to—those of conciliation, arbitration, and negotiation."

[29] 110 Cong. Record 1638 (emphasis supplied).

incumbent employees would emasculate the protection afforded the incumbent employees by the time limit. In this case, it would expand a time limit for an alleged victim to file her charge from 90 days to approximately 1,700 days.

In *Robbins & Myers* the Court said that in defining Title VII's jurisdictional prerequisites with precision, Congress did not leave to courts the decision as to which delays might or might not be "slight". 429 U.S. at 240. Similarly, we believe that Congress did not leave it to the courts to decide whether and in which circumstances the 90-day time limit could be converted into a period of (nearly) five years by the technical inadvertence of a charged party occurring long after the charge was filed. The description of the requirement of the filing of a timely charge as a "jurisdictional prerequisite" is accurate.

D. The Principles Of *Evans* Preclude The Action Taken By The District Court

The factual situation previously presented to this Court which most closely parallels that involved herein is that in *Evans, supra.* In that decision the portion of the flight attendant contractual seniority system sought to be set aside in order to grant seniority relief to plaintiff was a provision that seniority is irrevocably lost or broken after the separation from employment of a flight attendant (431 U.S. at 555-556, n.6).

In order to grant Plaintiffs seniority relief in the instant case, the settlement agreement purports to supersede the collective bargaining agreement, including necessarily Article 10(F) (IFFA Pet. at 63a) which provides:

> Any employee who resigns or who is dismissed from the service of the Company shall thereupon forfeit all previously accrued seniority, and the employee's name will be removed from the seniority list(s).

In view of the identical nature of the seniority provisions sought to be superseded in *Evans* and in this case, the

threefold holdings of *Evans* are not only supportive, but indeed dispositive, of the issues herein.

1. *Evans* held that a discriminatory act not made the basis for a timely charge [30] is the legal equivalent of a discriminatory act which occurred before the statute was passed, *and can be treated as lawful*; likewise, in the present case, irrespective of the Court's determination concerning the jurisdictional issue, there has been no finding of unlawful conduct. TWA has specifically not admitted to any unlawful conduct, and hence the conduct must be treated as lawful.

2. In *Evans*, after specifically noting that *Franks* was not controlling until "after an illegal discriminatory act or practice had been proved," the Court held that absent the timely filing of a charge, the court does not even reach the remedy issue; similarly in the instant case—and again irrespective of the jurisdictional question presented herein—there has been neither the finding or admission of a discriminatory act. Hence the court should not even reach the remedy issue.

3. *Evans* holds that a challenge to a neutral "seniority system may not be predicated on the mere fact that a past event having no legal significance has affected the calculations of seniority credit, even if the past event might at one time have justified a valid claim against the employer. *A contrary view would substitute a claim for seniority credit for*

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[30] The claims of Sub-Class B in the instant case were not, by the very definition of the Sub-Class, made the basis of a timely charge. Irrespective of this Court's determination of the jurisdictional issue presented herein, this fact places Sub-Class B plaintiffs in the same position as Evans. For in the ten-year history of this litigation, no court has determined that, assuming the time filing requirement to be one of limitation rather than jurisdiction, TWA waived the limitation period.

almost every claim which is barred by limitations." [431 U.S. at 560, emphasis added].

By the same token, in the case now before the Court, the past event (the termination of Sub-Class B members) can have no legal significance even if that past event might at one time have justified a valid claim against TWA. Hence, this past event, which has affected the calculation of Plaintiffs' seniority credits may not provide the basis for a challenge to IFFA's neutral seniority system.

Here, no timely charge was filed for Sub-Class B. Yet the court bootstrapped the "remedy" question to the settlement, and integrated hundreds of individuals who did not file timely charges into a neutral seniority structure to the detriment of present employees. The fact that the decision here arises out of a settlement does not diminish the controlling effect of *Evans*. The grant of seniority rests ultimately and necessarily on the order of the district court, which, even the settlement agreement acknowledges, must proceed pursuant to "all applicable provisions of law." The principles of *Evans* are "applicable," and prohibit the result reached here.

CONCLUSION

For the foregoing reasons, the judgment under review in No. 80-951 should be reversed.

Respectfully submitted,

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APPENDIX

CONSTITUTION, STATUTES, AND RULES INVOLVED

APPENDIX

United States Constitution

Article III:

Section 1. The judicial Power of the United States, shall be bested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Section 2. The judicial Power shall extend to all Cases, in Law ard Equity, arising under this Constitution, the Laws of the the United States * * *

Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e *et seq.*, provides in pertinent part:

Section 703(h), 42 U.S.C. § 2000e-2(h):

> Notwithstanding any other provisions of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.

Section 706(d), 42 U.S.C. § 2000e-5(d) (1970): *

> A charge under this section shall be filed within ninety days after the alleged unlawful employment practice occurred. . . .

Section 706(g), 42 U.S.C. § 2000e-5(g):

> If the court finds that the respondent has intentionally engaged in or is intentionally en-

* The time period is now 180 days and is found in § 706(e) under the 1972 amendments.

gaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. . . .

Amendment V: * * * [N]o person shall be deprived of Life, Liberty or property without due process of law, * * *

Railway Labor Act

The Railway Labor Act, as amended, 45 U.S.C. § 151-188 provides in pertinent part: Section 2, Seventh: No carrier, its officers, or agents shall change the rates of pay, rules or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

Federal Rules of Civil Procedure

Rules 23(e): Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Rules 82: Jurisdiction and Venue Unaffected. These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. An admirality or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C. §§ 1391-93.